Phase 1 Report

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Lands, Revenues and Trusts Review

Phase 1 Report

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Rapport de l'étape I

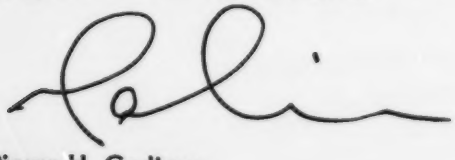
MINISTER'S FOREWORD

Over the past decade or more, there has been widespread recognition — both within Indian communities and the federal government — of the fundamental inadequacies of the *Indian Act*. I believe that the current Act needs to be updated so Indians can better achieve their political, social and economic goals.

The objective of the first phase of this three-part Lands, Revenues and Trusts Review was to systematically identify and define the wide range of concerns which have come to the forefront in recent years. Some 250 issues were identified in seven project areas: land management, land registry, moneys, estates, by-laws, band membership and elections. This publication provides a background to each of the areas, as well as a description of the problems and issues identified in this initial phase of the work.

Extensive discussions between Indian leaders and my Department, at the national, regional and local levels, have taken place over the past year and are continuing. A further report, to be published at a later date, will identify a wide range of options for change. That report will form the basis of further discussion and consultation.

Amending the *Indian Act* has been attempted on several occasions in the past, with very limited success. Today, I am optimistic that we can succeed. I believe that the major ingredient for success is a close working relationship with Indian people. I look forward to making further progress in this vital initiative.



Pierre H. Cadieux

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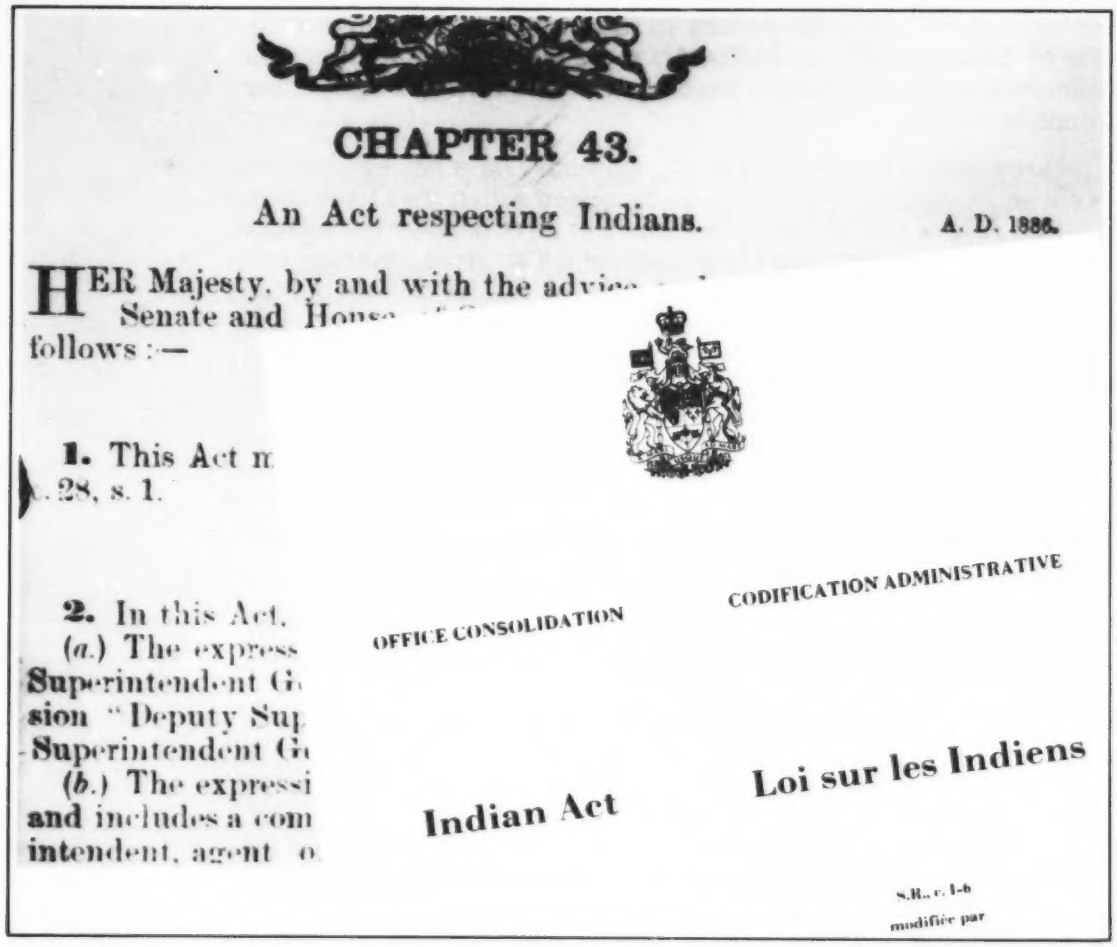
FOREWORD



CHAPTER 43.

An Act respecting Indians. A. D. 1886.

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OFFICE CONSOLIDATION

CODIFICATION ADMINISTRATIVE

Indian Act

Loi sur les Indiens

S.R., c. I-6
modifiée par

"Despite differences in tradition, language and culture, the basic, ultimate objective of Indian people is the same. Legislation must be kept at the level of accommodating our uniqueness and providing us with the ability and freedom to proceed with our own affairs." — Band Councillor

"We have to live (with the Indian Act) and generations after us have to live with the Act . . . We want significant changes, profound changes." — Band Member

As indicated by the above comments, Indian people embrace diverse cultures, languages, traditions and histories. Yet they share a common goal of gaining greater control over their day-to-day lives, their future, and the future of their children.

Indians widely regard the existing legislative base — the *Indian Act* — as incapable of accommodating this goal. From the perspective of Indian people, the Act is inflexible, restrictive and no longer in line with their aspirations. It places the Minister of Indian Affairs and Northern Development in a paternalistic role. Gaps in key areas of the legislation and regulations create uncertainty as to jurisdiction and authority. In short, Indians perceive the *Indian Act* to be seriously hampering their social, economic and political development — a view shared by other groups in society.

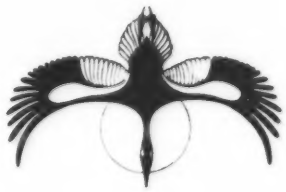
While Indian frustration with the legislative base has escalated in recent years, concern has also been expressed within the Department of Indian Affairs and Northern Development (DIAND) over its capacity to manage its responsibilities in the area of Indian lands, revenues and trusts. As well, these functions, which account for the vast majority of the provisions contained in the *Indian Act*, were scrutinized in the 1986 report of the Auditor General of Canada. The Auditor General recommended several changes in the department's policies and practices, including:

- upgrading of the Indian Land Registry;

- ensuring adequate qualifications, training and supervision of staff carrying out fiduciary responsibilities; and

- clarification of the extent of the department's legislative responsibilities, especially in the area of devolution of authority to Indian bands.

In recognition of the many problems and concerns emerging in the lands, revenues and trusts area, in October 1986 the Minister of Indian Affairs and Northern Development asked the President of the Treasury Board to undertake a comprehensive review of this sector of the department. The review was launched in February 1987 by the Office of the Comptroller General (OCG), with the cooperation of DIAND and the assistance of specialists from the private sector. It has since developed into the most fundamental analysis of the *Indian Act* ever conducted.



The review has three basic goals:

• to propose changes to the *Indian Act* and related regulations that will recognize Indian authority to exercise greater control of their own affairs, at their own pace;

• to develop new policies and mechanisms that respond to the legislative changes and facilitate the attainment of local community objectives; and

• to adequately resource and staff the Lands, Revenues and Trusts Sector of DIAND to administer existing and revised legislation.

Indian input is paramount to any legislative, regulatory and policy changes proposed by the review. In order to accomplish this, the review incorporates a consultation process that calls for Indian communities and leaders to participate extensively in developing options for change.

The Lands, Revenues and Trusts Review is being conducted in three phases. Phase I was carried out by the Office of the Comptroller General and involved identification of the principal issues to be explored in the review. The results of Phase I are reported in this publication.

During the winter of 1987-88, the mandate of the Comptroller General was significantly altered. This necessitated DIAND assuming responsibility for Phases II and III of the review. Phase II, which involves complete investigation of the issues with the department and Indians and the development of a wide range of options for change, was launched in the spring of 1988. It is anticipated that this work will be completed in early 1989, followed by Phase III. In this final stage, review teams, in conjunction with Indian leadership at the national, regional and community level, will consider options and develop more specific proposals that can lead to decisions for change.

In Phase I of the review, nine project areas were identified for detailed study: land registry, land management, Indian moneys, individual accounts, estates, by-laws, elections, membership, and legal liaison and support. Each of these areas is discussed in this publication, with the exception of legal liaison and support, which addresses management issues internal to DIAND and the Department of Justice.

DIAND has already taken action on several issues studied during Phase I of the Lands, Revenues and Trusts Review. For example, important amendments have been made to the Act in the areas of taxation (Bill C-115), minors' trust accounts and a surviving spouse's preferential share of an estate (Bill C-123). As well, the capabilities of the Lands, Revenues and Trusts Sector have been strengthened. During a time of major resource reductions in other parts of the department, additional resources have been made available to the sector to upgrade staff qualifications and to address areas where backlogs have developed. A resources study has also been completed that focuses on service delivery requirements over the short and medium term.

Nevertheless, the bulk of the work remains ahead, both for the department and for Indians and their communities. As indicated, Canada's Indian people will play a leading role both in determining what changes should be implemented and according to what timetable. All phases of the review will be carried out working together with Indian organizations and communities. This will prove particularly important as options are being refined and proposals for legislative change are being developed.

GUIDING PRINCIPLES OF THE LANDS, REVENUES AND TRUSTS REVIEW

The Lands, Revenues and Trusts Review is guided by the following principles:

- no unilateral reduction of the Minister's responsibilities to Indian people.

- the overriding direction of the Lands, Revenues and Trusts Review will be supportive of self-government. All initiatives will focus on this.

- every opportunity should be made to maximize local control by Indian people.

- proposals for change, including legislative changes, will be primarily optional in nature (i.e., bands will decide when they wish to undertake increased responsibility and accountability).

- as changes occur, the appropriate balance of individual rights and collective rights must be addressed.

- bands should have access to the resources required to assume responsibilities in the lands, revenues and trusts area.

- options for change must take into account the significantly lesser involvement of departmental officials in the conduct of Indian affairs.

THE LANDS, REVENUES AND TRUSTS SECTOR

The Department of Indian Affairs and Northern Development administers the provisions of the *Indian Act* and provides a wide range of services to status Indians across Canada. These functions, which are aimed at improving the overall social and economic conditions for Indians and advancing the cause of self-government, are carried out by different sectors within the department.

The Lands, Revenues and Trusts Sector of DIAND is responsible for:

• *maintaining a register of status Indians, as well as band membership lists for bands that have not assumed control of their membership program.* Between 40,000 and 50,000 routine entries are made to the Indian Register each year, due to births, deaths and marriages. In the past three years more than 50,000 new names have been added to the Indian Register as a result of Bill C-31, which removed discrimination

based on gender and marital status from the *Indian Act*. The workload in this area is growing dramatically. It is expected that the status Indian population will approach 500,000 by 1991.

• *managing Indian lands*. There are 2,261 Indian reserves in Canada, comprising approximately 2.6 million hectares (6.5 million acres). In 1985-86, land transactions involving more than $22 million were under administration by the department.

• *registering all documents granting or claiming an interest in Indian reserve-designated and surrendered lands*. The Indian Land Registry contains more than 1.5 million entries. About 8,000 new transactions are entered into the Registry annually.

• *managing band funds*. Band revenues and capital moneys administered by DIAND total approximately $820 million.

• *managing the moneys of Indian minors, missing persons and mental incompetents*. Currently, there are 21,000 such accounts, with a value of some $150 million.

• *administering the estates of deceased Indians who normally resided on reserve or Crown lands*.

• *reviewing by-laws and, where required by the Act, recommending either approval or disallowance*. Departmental officials register, on average, more than 200 by-laws annually. Between January 1975 and September 1987, 380 bands made some use of this instrument of local government, and the trend is expected to continue with the movement towards increased Indian control over their own affairs.

• *overseeing elections of band councils and election appeals for those bands whose elections are governed by the provisions of the Indian Act*. DIAND oversees the conduct of approximately 350 elections for chief and council. These elections are held every two years and represent a significant workload.

• *helping Indian and Inuit people respond to adverse environmental impacts (for example, from resource development projects or environmental emergencies) on their reserve lands, waters or traditional land-use areas*.

LAND MANAGEMENT

Background

Indian people believe that developing the potential of their lands will be a major contributor to economic independence and self-sufficiency. Canada's 592 Indian bands currently possess 2.6 million hectares (6.5 million acres) of land held in 2,261 reserves.

The *Constitution Act* (1867) gives the federal government jurisdiction over lands reserved for Indian bands. Parliament has exercised this jurisdiction over the years through a series of amendments to the *Indian Act*, the most recent of which was passed in 1951 and grants the Minister of Indian Affairs and Northern Development important powers and responsibilities for Indian land management.

Land transaction activity has increased dramatically in recent years as the value of Indian lands has risen. For example, the Indian Land Registry, which is maintained by DIAND (see Land Registry section), registered 6,300 documents in 1988 compared to only 2,700 documents in 1968 — an increase of 133 per cent. Between 1982 and 1988, approximately 41,000 land transaction documents were registered in the Indian Land Registry.

The value of these land transactions has also increased dramatically. In 1982, DIAND administered (on behalf of bands) 4,200 revenue-generating leases and permits with a value of $6.8 million. In 1987, there were 12,000 lease and permit transactions with a value of $30 million. It is anticipated that by 1991, such transactions will total 15,300, with a value of $35 million.

Bands believe that, to achieve economic independence and self-sufficiency, they must have increased authority and make more decisions regarding the management of their lands. However, the restrictive provisions of the *Indian Act* currently prevent bands from assuming this increased authority and decision making power.

Indian bands, as well as officials of DIAND, consider many of the current *Indian Act* sections that deal with the management of reserve lands to be outdated, paternalistic and confusing. For example, the Act is considered to be outdated because it was designed to handle land administration issues as foreseen in 1951 — and these issues are considerably more sophisticated today. Lands which were limited to agricultural purposes in 1951 can now be considered for a variety of other uses, including shopping malls and office buildings that can generate substantial revenue for the band.

The Act is also considered to be paternalistic. Several sections dealing with land transactions do not require the involvement of the band or band council with the Minister in the decision-making process. As a result, there is an obvious lack of direct band control over land management matters. Bands consider the Minister to be too involved in the management of their lands, and believe that the Minister's role should be reduced considerably, and in some areas, ended.

As well, Indian bands, lawyers and departmental officials consider many sections of the Act that deal with the management of lands to be unclear, ambiguous, and in some cases, contradictory. These sections further inhibit the ability of bands to efficiently manage their lands.

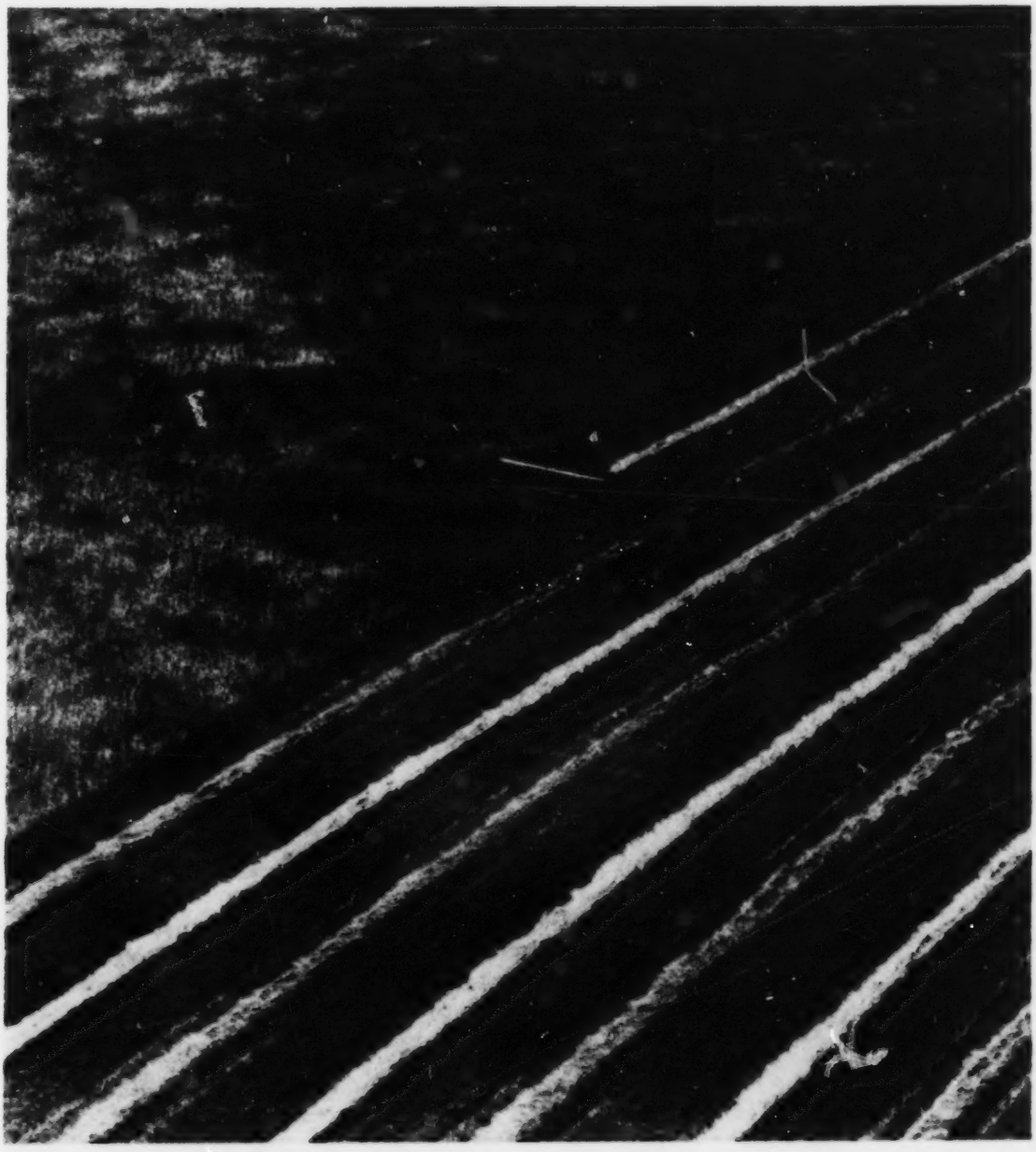
Problems and Issues

During Phase I of the Lands, Revenues and Trusts Review, a number of specific areas of concern to bands and departmental officials were identified.

For example, many bands believe that section 28(2) of the *Indian Act*, which deals with the issuing of land use permits, unnecessarily limits their ability to make decisions. Under this section, the Minister is not required to obtain band council consent to issue permits for a period of up to one year.

Section 28(2) is also confusing to bands in several respects. It does not define the term "occupy and use", does not indicate whether persons granted permits are authorized to live on the reserve, and provides no direction on the duration of permits granted for more than 12 months. Indian bands have also questioned whether section 28(2) is intended for use in issuing short term agricultural permits or longer term permits such as residential, commercial or right-of-way uses.

The procedure for issuing leases, as outlined under section 58(1) of the Act, has also been identified by Indian bands as an area of concern. This section is viewed by Indians as restrictive because it limits the issuing of leases to "uncultivated or unused" reserve land. Most reserve lands cannot be classified in this category. Also, there is no time period specified for these leases.



Section 58(3) of the Act is also confusing to bands. This section empowers the Minister to lease, for the benefit of an individual Indian, lands held under a Certificate of Possession. However, section 58(3) does not address the length of time of the lease, nor the division of lease revenues between the band member and the band council.

More important, there is no requirement in section 58 for the Minister to obtain band council consent before leasing lands held by an individual under a Certificate of Possession. Also, the Act does not explain why these lands can be leased by the Minister without a formal band surrender, whereas the leasing of other reserve lands requires a band surrender under section 37.

It should be noted that bands *want* to lease reserve lands without having to surrender the land. In this regard, they consider the section 37 surrender provision of the *Indian Act* to be restrictive. Bands also object to the surrender process required under section 39, which they believe causes lengthy administrative delays and lost economic development opportunities.

Section 35 of the *Indian Act*, which deals with lands required for public purposes, is another area of concern for Indian bands and departmental officials. Under section 35(1), band council consent is not required for the expropriation of reserve land for public purposes. Also, this section does not clarify the status of expropriated land once it is no longer required for public purposes. Bands believe that such lands should be returned to reserve status. In addition, section 35(4) of the Act does not indicate when compensation is to be paid to the band, or how these moneys are to be divided between the band and individual band members who originally held Certificates of Possession for the lands.

During Phase I of the Lands, Revenues and Trusts Review, Indian bands also raised concerns with the delegation of Ministerial authority for the management of surrendered and reserve lands under sections 53 and 60 of the Act. Bands object to the annual funding level of $35,000 for this activity, the funding time limit of five years, and the limited resources available for training band members to take on land management responsibilities.

Bands also expressed concerns that the Minister's remaining responsibilities under sections 53 and 60 are not clearly defined, that bands are not empowered to delegate their new authority for land management to band councils, and that the authorities delegated by the Minister to bands under sections 53 and 60 can be revoked without a formal procedure in which bands are consulted.

In summary, bands have indicated that they want a land management system in which Indian people can exercise authority over their lands with less interference from the Minister and DIAND officials.

Phase II

Based on the results of Phase I of the Lands, Revenues and Trusts Review, Phase II will focus on a number of problems in key issue areas. These include:

- identifying opportunities to increase the involvement of the band and band council in the decision making process involving their lands;

- identifying methods to correct the restrictive and ambiguous sections of the *Indian Act*;

- identifying a range of options which would enable Indian people to assume more control over the management of their lands; and

- identifying ways of streamlining DIAND processes and procedures to facilitate the administrative requirements of land transactions.

LAND REGISTRY

Background

Sections 21 and 55 of the *Indian Act* require the federal government, through the Department of Indian Affairs and Northern Development, to operate an Indian Land Registry. The Registry is maintained in the National Capital Region under the direction of the Land Registrar, the official custodian of records concerning Indian lands. The Registry has two main functions: to register documents concerning Indian lands and to provide information from these documents to a variety of users.

All documents granting or claiming an interest in Indian reserve land, either designated or surrendered, must be registered and deposited in the Indian Land Registry. During the seven-year period from 1982 to 1988, 41,000 new land transaction documents were registered in the

Indian Land Registry. The Registry now holds about 150,000 documents and some 210,000 indexes containing more than 1.5 million entries.

Each year, the Indian Land Registry issues an average of 2,000 Certificates of Possession to band members and 450 Registrar's Certificates confirming the most recent documents on record. As well, since documents held in the Registry constitute a public record, Registry staff are regularly asked to search for and release information on Indian lands. During an average year, Registry staff handle about 4,500 such requests. Users of this information include members of Indian bands, financial houses, lending corporations, development companies, commercial investors, farmers and DIAND program officers. The Indian Land Registry also distributes records to the department's regional and district offices and to band offices to enable staff to carry out land management activities.

Problems and Issues

As the value of economic activity on Indian reserves increases, so does the need for a complete and accurate land registration system with a solid legislative base. During Phase I of the Lands, Revenues and Trusts Review, several problems and issues were identified by bands and departmental officials regarding the Indian Land Registry.

For example, bands are concerned with the general issue of record-keeping. The Indian reserve system dates back to the 1700's in Canada, and over the years land record-keeping practices have undergone many changes. As a result, documents have not been filed according to a single standard or system.

The current Indian Land Registry was established in 1967. Although much of the material contained in old registers and books was deposited in the Registry, some documents remain in archival and departmental records. As a result, the completeness of the information in the Indian Land Registry is questionable.

Bands and other users of the Registry's current manual record-keeping system have also commented on:

- the long turn-around time required by the Indian Land Registry to register land documents and to respond to enquiries;

- the need for a full accounting of the disposition of lands set apart for the use and benefit of Indian bands, beginning with the year when the reserve was originally surveyed;

- the lack of information on the extent of the lands held for any particular band at any given time; and

- the efficiency and accuracy of title searching.

Local accessibility to the records contained in the Registry is another area of concern raised by bands. The existing Indian Land Registry is not easily accessible at the local level. Consequently, DIAND officials have followed a practice of distributing copies of Registry's abstracts and microfiche of documents to regional and district offices. This procedure has resulted in numerous problems, including incomplete, inaccurate and sometimes conflicting records.

Computerization of the Indian Land Registry is now underway to upgrade the quality and accuracy of the Registry and to make it more accessible to bands at the local level. However, this has resulted in a new set of problems. The previous computer programming language on which the Registry is based is now outdated and is not familiar to most computer programmers. This creates difficulties in maintaining the system and adding needed features. About 100 changes have already been identified to make the system functional. Without a new programming language, further significant programming changes could de-stabilize the system.

Bands are also concerned over the issue of surveys. In addition to the registration of documents, a survey is required to establish that interests in Indian lands have been validly conveyed. Without adequate surveys, parcels of land may overlap substantially or irregularities may occur that place in doubt the location of a parcel and its relationship to other parcels.

A number of problems are evident both to bands and to departmental officials in the survey area. For example, some existing records are based on crude surveys dating back to informal sketches prepared by Indian agents. In other instances, desk-drawn surveyors' plans may have been used instead of actual survey plans to save time and money. As well, surveyors often fail to research the records held in the Indian Land Registry, and may correct or negotiate boundary discrepancies on the spot without notifying the Registry. Moreover, surveyors do not always document irregularities in their reports.

Indian bands and other users of the system are also involved in ongoing discussions with departmental officials on whether the Registry should be based on a "deed" or a "title" system.

In a deed system, only registered documents would have any validity, and their existence would be reflected in abstracts maintained by the Registrar. In such a system, once a document has been registered, all parties have been deemed to have been given notice of the document. This makes it incumbent on anyone dealing in land to conduct a full and thorough search of the title to a property.

In a title system, on the other hand, the acceptance of a document by the Registrar would be deemed to constitute an amendment to the register. The register is considered to be complete and no further enquiries would be necessary as to the title to a property.

Some Indian bands, developers, lending institutions and other interested parties (particularly in western Canada) are also concerned that the existing land registration system does not provide the safeguards normally afforded by provincial systems. One reason for this is that the *Indian Act* and related regulations do not cover such important matters as priority and effect of registration, the maintenance of records, and registration of survey plans and documents. For example, for purposes of determining priority of registration, it is not clear at what point documentation is deemed to have been received by the Registrar when the documents are submitted by DIAND regional or district staff.

Finally, both bands and departmental officials have questioned whether the Indian Land Registry is adequately resourced to maintain the high quality of service which is required to respond to band enquiries and band needs for registration. In this regard, the current process of converting the records from a manual to an automated system has placed an added workload on Registry staff.

Phase II

Based on the findings of Phase I of the Lands, Revenues and Trusts Review, Phase II is focussing on a number of problems in key issue areas. These include:

- band accessibility to the Registry at the local level through automation;

- the completeness and accuracy of the Registry records;

- the need to develop a new and up-to-date computer program language for the Registry;

- whether the Indian Land Registry should function as a "deed" or "title" system;

- the need for additional resources to enable DIAND to fulfill its land registration responsibilities; and

- identifying any changes to the legislative or regulatory base which may be necessary.

MONEYS

Background

Indian moneys were first defined in the 1951 revision of the *Indian Act*. These moneys may belong collectively to members of a band or to individual Indians. Under the Act, the Minister of Indian Affairs and Northern Development is required to hold these moneys, and is authorized to release them for purposes which in his opinion benefit the band or individual members. Indian moneys are held in the Government of Canada's Consolidated Revenue Fund, either in band accounts or in accounts for individual Indians. Interest is calculated quarterly using month-end balances and is credited to the accounts semi-annually.

Moneys belonging to the collective members of a band may be in the form of either "capital moneys" or "revenue moneys". Capital moneys are derived from the sale of surrendered lands or capital assets of the

band, and are collected, received and held by the Crown for the use and benefit of members of the band. Capital moneys for all bands currently amount to approximately $750 million.

Capital Moneys

Under section 64 of the *Indian Act*, bands may ask the Minister to release capital moneys by providing the Department of Indian Affairs and Northern Development with a band council resolution (b.c.r.) that indicates the purpose for which the funds are being sought. The consent of the band as a whole is not required by the Act.

Sub-sections 64(1)(a) to (k) of the Act outline the purposes for which capital moneys may be released. With two exceptions, the decision to release moneys has been delegated to DIAND's regional officials. The exceptions are when the money will be used for the purchase of reserve land (sub-section 64(1)(d)) and for "any other purpose that in the opinion of the Minister is for the benefit of the band" (sub-section 64(1)(k)). In these cases, departmental officials make recommendations to the Minister to release or withhold the funds requested. In all cases, the Minister (through the department's officials) is required by section 61 of the Act to ensure that Indian moneys are expended only for the use and benefit of the band as a whole.

Sub-section 64(1)(a) allows for the distribution of up to 50 per cent of a band's capital moneys directly to band members. Since 1985-86, approximately $213 million have been disbursed through these per capita distributions, primarily to those bands who enjoy revenues from oil and gas. In such cases, the Act requires the Minister to ensure that all band members are treated equitably. Where necessary — as in the case of minors and mental incompetents — per capita distribution moneys are held by the department in individual trust accounts.

Revenue Moneys

Revenue moneys are all band moneys other than capital moneys. These include proceeds from the sale of renewable resources (such as crops), from the rental or lease of band property, and interest earned from capital moneys. Approximately $70 million is currently held by the government in band revenue accounts.

Revenue moneys are covered by sections 66 and 69 of the *Indian Act*. While section 69 gives the band as a whole the power to manage and control revenue moneys, in practice the band council tends to exercise these powers. Band revenues are generally received by DIAND's district or regional offices, which deposit the funds in the Consolidated Revenue Fund. As in the case of capital moneys, bands may request the Minister to release the funds through the provision of a band council resolution.

Individual Moneys

DIAND also holds moneys in trust for individuals such as minors, missing persons and mental incompetents. Currently, these accounts contain approximately $150 million, with the bulk of these moneys belonging to minor children as a result of per capita distributions.

Historically, the *Indian Act* has provided little direction with respect to expenditures of these moneys. However, with the recent passage of Bill C-123, band councils can now direct the payment of up to $3,000 a year of a minor's per capita distribution to the parents or person responsible for the care and custody of the minor. Bill C-123 further provides for the parent, person responsible or band council to request that the principal in a minor's account be disbursed at age of majority in installments over three years, rather than in a lump sum.

Section 51 of the Act gives the Minister exclusive jurisdiction over the property of a mentally incompetent Indian who is ordinarily resident on reserve. Among other duties, the Minister has the power to appoint persons to administer the individual's estate, and must ensure that the individual's moneys (if any exist) are held in trust. An individual or institution may apply to the Minister for the release of trust moneys to be used for the maintenance and benefit of a mentally incompetent Indian.

During the 37 years since the sections of the *Indian Act* dealing with Indian moneys were written, there have been few legal interpretations in this area. At the same time, significant social, economic and political changes have taken place. The value of Indian lands in many parts of the country has increased dramatically, and oil and gas leasing arrangements have generated large sums of money for some bands. Moreover, in recent years Indian people have demonstrated a strong desire to take on greater responsibility for the management of their moneys.

Problems and Issues

During Phase I of the Lands, Revenues and Trusts Review, a number of broad problems and issues were identified in the Indian moneys area.

The most evident is the fundamental lack of Indian control and decision making power over their moneys, combined with the requirement under the *Indian Act* that the Minister make all final decisions on their behalf.

Over the years, DIAND has attempted to interpret in the broadest possible way the sections of the Act dealing with the authority of bands and band councils to control and influence the management of their moneys. Nevertheless, many bands believe that the practices that have resulted from this approach do not go far enough in dealing with their concerns. These sentiments have been echoed by the Auditor General of Canada (and confirmed by the recent Commission of Inquiry dealing

with the Westbank Band), who in his 1986 report to Parliament highlighted the lack of a legislative base for the authority and responsibility that bands want.

Capital Moneys

Opposition is growing to sub-sections 64(1)(a) to (k) of the Act, which outline the purpose for which the Minister or his officials may release band capital moneys. Many bands have indicated a desire to make their own decisions as to when and how moneys will be spent.

Capital moneys have often been described as trust moneys, which some feel implies a responsibility on the part of the Crown to safeguard these funds, particularly the principal. In the non-Indian community, generally only the income generated from the trust can be used for specifically prescribed purposes. Encroachment on the capital portion of the fund, if permitted at all, is usually only for extraordinary purposes, thus ensuring that the mission of the trust fund can continue to be carried out in the future.

Indian bands, however, occasionally use capital moneys (through section 64(1)(i) of the Act) to support ongoing band programs and activities. Since ongoing activities cannot be described as extraordinary and, according to usual practice, should not be funded by capital moneys, concerns have been raised. This practice is further clouded by the fact that the band's capital is being eroded and not protected for the future.

Bands have requested, and the Minister has agreed in many cases, to use section 64(l)(k) of the Act (which allows for expenditures "for any other purpose that in the opinion of the Minister is for the benefit of the band") to authorize expenditures for investments.

Indian investment interests have become increasingly complex and wide ranging, encompassing such on-reserve ventures as leisure facilities, hotels, shopping centres and housing developments, as well as national and international enterprises off-reserve. As a result, the department has in some cases sought expert advice on the economic viability of specific proposals before making a recommendation to the Minister. Some bands have argued that such procedures are slow and bureaucratic, and often have a negative impact on the investment proposal. Again, this raises the concern on the part of bands that they have little direct control over their own capital moneys.

Revenue Moneys

Questions have also emerged as to the Minister's responsibility for authorizing and directing the expenditure of revenue moneys.

Opinions expressed in the past suggest that under the current Act the Minister must be satisfied that any expenditures that would deplete revenue moneys held in the Consolidated Revenue Fund are for the general progress and welfare of the band and its members, or are directed towards one of the more specific purposes described in section 66. Furthermore, it has been suggested that any transfer of revenue moneys from the Consolidated Revenue Fund into band private accounts might compromise the government's trust obligations to protect a band's moneys. DIAND is currently reviewing the implications of this assessment.

The *Indian Act* vests title to reserve lands with the Crown, not bands, and only the Crown is authorized to collect revenues from leases. To bypass this provision, some bands lease reserve lands through "buckshee" leases, which are not registered with the department. This practice, which is not recognized under the Act, does not provide adequate protection to Indian people as they are unable to legally enforce the provisions of a buckshee lease.

Individual Moneys

Finally, in the area of individual Indian moneys, the Act requires the Minister to maintain trust accounts (where moneys exist) for mentally incompetent persons. However, no guidance is provided as to how and when these moneys can be disbursed for the individual's maintenance and benefit. Moreover, the *Indian Act*'s requirement that the Minister make decisions on behalf of minors and the mentally incompetent is not consistent with Indian peoples' aspirations to assume greater control over their own resources.

Phase II

Based on the findings of Phase I of the Lands, Revenues and Trusts Review, Phase II will focus on a number of problems in key issue areas. These include:

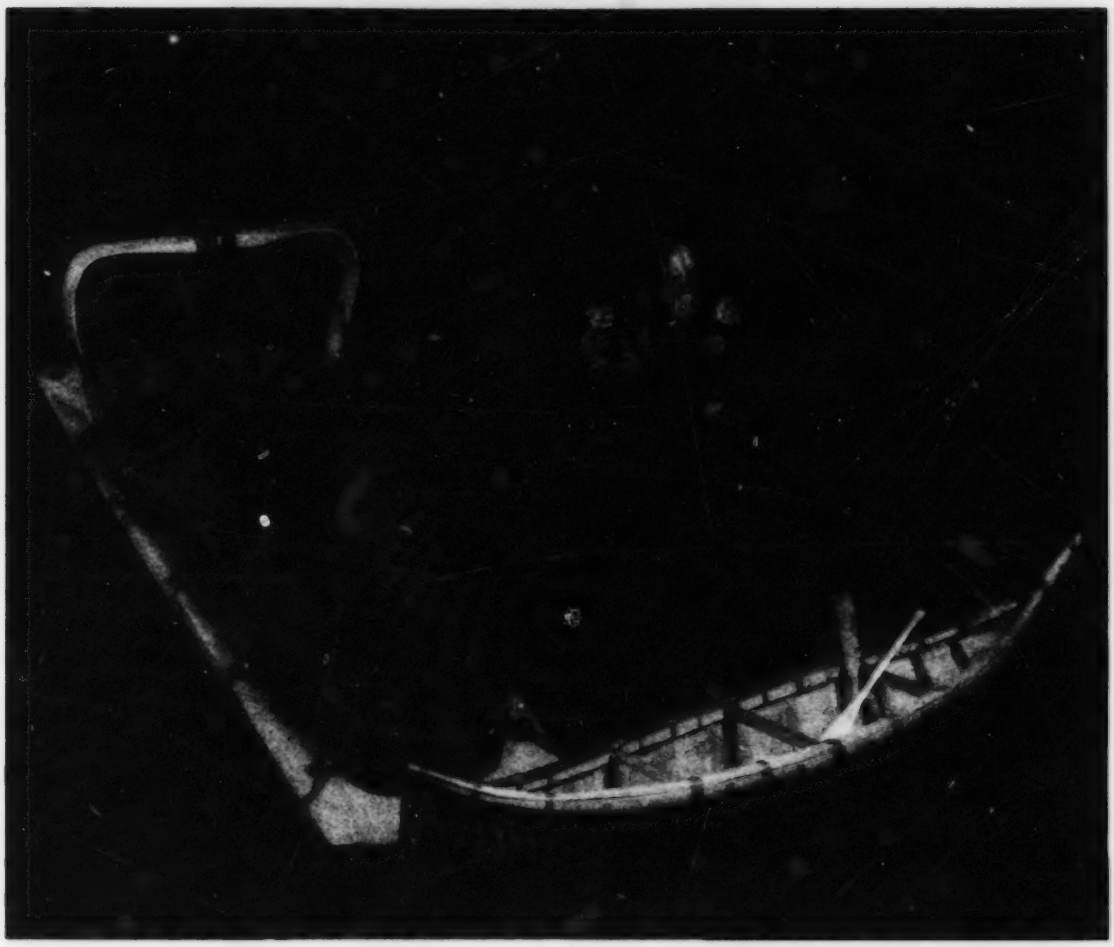
- the lack of Indian control and decision making power over their moneys and the requirement that the Minister make final decisions on their behalf;

- the extent of control and responsibility Indian people want over their money;

- the role (if any) Indian people wish the Minister to play; and

- the development of alternative delivery mechanisms designed to maximize local control by Indian people.

ESTATES



Background

Section 42(1) of the *Indian Act* authorizes the Minister of Indian Affairs and Northern Development to administer the estates of deceased persons who, at the time of death, were either registered or entitled to be registered as Indians and who were ordinarily resident on reserve or Crown lands. The Act includes the *Indian Estates Regulations*, which outline specific requirements to fulfill the obligations imposed by the Act.

The Minister's duties in this area are normally exercised by officials of the Department of Indian Affairs and Northern Development at the district or regional level. However, under section 44(2) of the *Indian Act* the Minister may choose to have the estate administered by a provincial court. This may occur, for example, when the deceased was involved in a complex business enterprise and expert legal and accounting evi-

dence is required to settle the estate. When jurisdiction is transferred, the Minister must ensure that the estate is administered according to the *Indian Act* and the *Indian Estates Regulations*.

A deceased Indian's estate includes any personal property and interest in land to which the individual was entitled at the date of death. Under the *Indian Act*, band members cannot own reserve land. They can, however, be allotted interest in reserve land by the band. This interest can be transferred only to a person or persons eligible to reside on the reserve where the land is situated. Section 50 of the Act requires that the interest of an heir who is not entitled to reside on the reserve be offered for sale. Only those entitled to reside on the reserve may bid on this interest.

Problems and Issues

Difficulties encountered in the administration of Indian estates generally fall into four categories: inadequacies in the legislative base, recent legislative amendments, reserve land characteristics and the department's resources in the estates area.

It is generally acknowledged that the *Indian Act* does not provide adequate direction on several key estate administration issues. For example, the Act does not address the fact that Indian customs vary from band to band. For estate administration purposes, determination and proof of family relationships require written documentation, which is not always available as Indian society is characterized by oral tradition and informal record keeping. In order to substantiate claims, departmental staff must therefore approach the Indian community for evidence of family relationships and other personal matters — a practice which is intrusive and inconsistent with the desire of both Indians and DIAND to increase local Indian control. The recent passage of Bill C-123 has increased the spousal share of an estate from $2,000 to $75,000. This will facilitate the administration of estates of less than $75,000 and reduce departmental involvement.

However, even when the assets held by a deceased Indian are not in dispute, estate administrators may experience difficulties in determining the beneficiaries of the estate. For inheritance purposes, the *Indian Act* recognizes child adoption by Indian "custom", but does not define custom. Neither does the Act set out a procedure or give guidelines for determining whether an individual has been custom-adopted. As a result, an individual could erroneously be deemed to be custom-adopted and thereby disinherit the rightful heirs. Conversely, the lack of a clear definition could disinherit children legitimately adopted by Indian custom. Many Indian people feel these are issues that can only be dealt with at the band level, and that the *Indian Act* should provide for such local decision making.

Problems also arise with regard to the provisions of the *Indian Act* which apply when an individual dies intestate (without a will). More than 90 per cent of Indians die intestate. In such cases, the Minister must, pursuant to section 43(a) of the *Indian Act*, appoint a personal representative or an administrator to administer the estate. There are no guidelines in the Act as to when a family member (as opposed to a departmental staff member) should be appointed as the personal representative of the deceased.

In the non-Indian context, a family administrator would generally be bonded to ensure that the deceased's assets are protected. Moreover, the assets would be insured for additional protection. In the Indian context, there is a lack of certainty as to the bonding requirements when a family member is appointed as the deceased's representative. Assets situated on a reserve cannot be seized, which makes it difficult to obtain insurance or an administration bond. In such cases, the Minister must choose between waiving the bonding requirement and assuming liability for the representative's actions, or restricting the administrator's role to the handling of non-monetary assets.

Many of these problems could be minimized or eliminated through the use of a well-drafted will. For example, if the will named a personal representative, bonding would not be required. There would be no need to establish family relationships, as the beneficiaries would be listed. Section 50 land sales could be avoided if the deceased named individuals who were entitled to reside on the reserve as the beneficiaries of the deceased's interests in reserve land. Identification of assets could be facilitated if all the property was listed in the will.

Recent amendments to the *Indian Act* have had a major impact on the administration of estates. Bill C-31, which removed discrimination based on gender and marital status from the Act, has resulted in the reinstatement of some 50,000 Indians to date. The appearance of additional legitimate heirs through this process has further complicated DIAND's ability to ensure the proper distribution of reserve assets. As well, the provision of Bill-C31 which allows bands to administer their own membership codes has in some cases made it more difficult to identify and locate heirs.

Bill C-31 also has implications for the transfer of a deceased's interest in reserve land. Since only those eligible to reside on the reserve may bid on land interests, the revenue generated by these sales is often less than the land is worth. To avoid the inequity of a land sale, Indian families have often arranged for eligible members to buy out the interests of their relatives who are not entitled to reside on the reserve. Some Indians who have been reinstated as a result of Bill C-31 (and are now eligible to live on the reserve) are seeking to have these previous agreements set aside in order to take possession of their interest in reserve land.

Problems also arise in the administration of estates because of sketchy or missing documentation of reserve land holdings. Unlike land owned by the majority of non-Indians, reserve land holdings are often not clearly defined or surveyed. Some bands issue Certificates of Possession which give the holder the right to possess a defined reserve land interest, while others (particularly in the prairies) use a system of informal allotment of an occupancy right.

In the Maritime provinces, the veteran's landholding issue is a unique problem. To quality for housing grants offered by the Department of Veterans Affairs, Indian veterans of World War II were required to demonstrate that they "owned" three acres of land. The veteran's band would often provide him with a certificate to this effect for the purpose of obtaining the grant. However, no corresponding allotment of land was recorded. When the veteran dies, it is extremely difficult to establish title to the land upon which the estate house stands, as there is no formal documentation of the land holdings.

An issue which complicates the administration of some Indian estates is the interpretation of section 88 of the *Indian Act*, with regard to the application of provincial law. Problems of interpretation arise because in some cases the Act talks in general terms about a matter but does not deal with the specific situation. It is, therefore, unclear whether the provincial law should be applied. Among other problems, this has raised the question of whether provincial matrimonial laws make personal property situated on the reserve subject to a division of assets.

Finally, the general downsizing within DIAND and the resulting closure of district offices have reduced the number and accessibility of the department's estates staff. As a result, it often takes longer to settle an estate, which can create hardships for family members who are awaiting the distribution of the deceased's land and cash assets. Further, in his 1986 report the Auditor General of Canada indicated that DIAND's estates personnel lacked adequate training and recommended that the department take steps to correct this problem.

Resolution of these and other issues will become critical as bands assume greater responsibility for the administration of their members' estates.

Phase II

Based on the findings of Phase I of the Lands, Revenues and Trusts Review, Phase II is focussing on a number of problems in key issue areas. These include:

- the current role of the Minister and DIAND and options for administering Indian estates that will maximize Indian control of their personal affairs;

- the need for flexibility in the *Indian Act* to enable bands to make decisions at the local level and according to their own customs; and

- the development of standards for estates administration, including appropriate training.

BY-LAWS

Background

The authority to enact laws is one of the most important means available for governments at all levels to achieve basic objectives. This is as true for Indian communities as it is for non-Indian communities. Indian band councils are authorized to pass by-laws under sections 81, 83 and 85.1 of the *Indian Act*. These by-laws usually apply to anyone on the reserve and have the full force of law.

Under section 81 of the Act, band councils may pass by-laws on such general matters as health, traffic, nuisances, local works (such as roads), zoning, buildings, etc. These by-laws must be consistent with the *Indian Act* and with any regulations made by the Governor in Council. Section 83 permits a band to pass by-laws dealing with taxation and the

raising and spending of money. Under section 85.1, the band council may pass by-laws governing "intoxicants".

Section 82 of the *Indian Act* empowers the Minister of Indian Affairs and Northern Development to disallow a by-law enacted under section 81. Such a by-law may be disallowed if, for example, it is *ultra vires* or if it contravenes the Canadian Charter of Rights and Freedoms or the *Criminal Code*. If the Minister does not disallow the by-law within 40 days, it automatically comes into effect.

All by-laws passed by bands under section 83 of the *Indian Act* are subject to the approval of the Minister of Indian Affairs and Northern Development. The Minister does not hold disallowance powers over section 85.1 by-laws, but copies of these must be forwarded to the Department of Indian Affairs and Northern Development for recording purposes.

The use of by-law powers by bands has historically been low. Most bands have had fewer than seven by-laws actually recorded with the department. Only a few bands in each region of the country have more than ten by-laws in force. Among the factors that have contributed to the low levels of activity in this area are the lack of assistance available to bands to develop by-laws, jurisdictional questions, legal costs, enforcement problems and the belief held by some bands that by-laws are not suitable to their circumstances.

Notwithstanding the above, with the movement towards greater control by Indian communities over their local affairs, the use of by-laws has been increasing. Between January 1975 and September 1987, about 380 bands made some use of by-laws. The department is now registering more than 200 by-laws annually, and this trend is expected to continue, especially with the passage of Bill C-115, which clarified and strengthened the powers of band councils to tax all forms of interest in and use of reserve lands. Many bands are expected to exercise these taxation powers through the passage of taxation by-laws.

Problems and Issues

A number of key problems and issues were identified in the by-laws area during Phase I of the Lands, Revenues and Trusts Review.

Perhaps the most obvious is that the *Indian Act* does not clearly define the scope and jurisdiction of band by-law powers. Under the *Constitution Act* of 1982, there is a division of legislative powers between the federal and provincial governments. How Indian by-laws fit into this framework has not been plainly established. References in the *Indian Act* to specific by-law making powers are confusing and do not establish clear jurisdiction. As a result, the potential of band by-laws as a means of local government has not been well understood or explored by Indian communities.

Section 81 of the *Indian Act* is outdated and incomplete. While it grants bands the power to pass by-laws on such minor issues as noxious weeds and bee keeping, less specific mention is made of more

important matters, such as administration of band affairs, fiscal management, land development, social and welfare services and environmental protection.

These weaknesses in the *Indian Act* are made worse by a lack of information on jurisdictional issues (ie., federal versus provincial responsibilities). This can be attributed in part to a relative absence of case law with respect to Indian by-laws. The end result is that there is no technical or legal basis to guide the formulation of by-laws, no sample by-laws, no substantive guidelines and few suitable regulations. To date, the only resources available to a band are lawyers and copies of recorded by-laws.

The by-law review and approval process is also a major problem area. Section 82 is clearly out of step with the trend toward granting Indians greater control over their own affairs. It has been suggested that DIAND's multiple roles in the approval process places the department in a difficult position. Not only does DIAND define the regulations governing Indian by-laws, but it also advises bands on the development of by-laws and recommends approval or disallowance.

One solution often proposed for this dilemma is to limit the department's involvement to significant areas, such as those where human rights issues are raised or where there is a major jurisdictional issue at stake (such as fisheries). It has also been suggested by some Indian communities that the role of the department as "advisor" might be expanded, or perhaps taken over by an independent body (a tribunal, for example) appointed by the Minister.

Enforcement of band by-laws is also a difficult issue, given the wide variety of enforcement arrangements that exist in various locations across Canada and the lack of adequate resources and capacity in many other parts of the country.

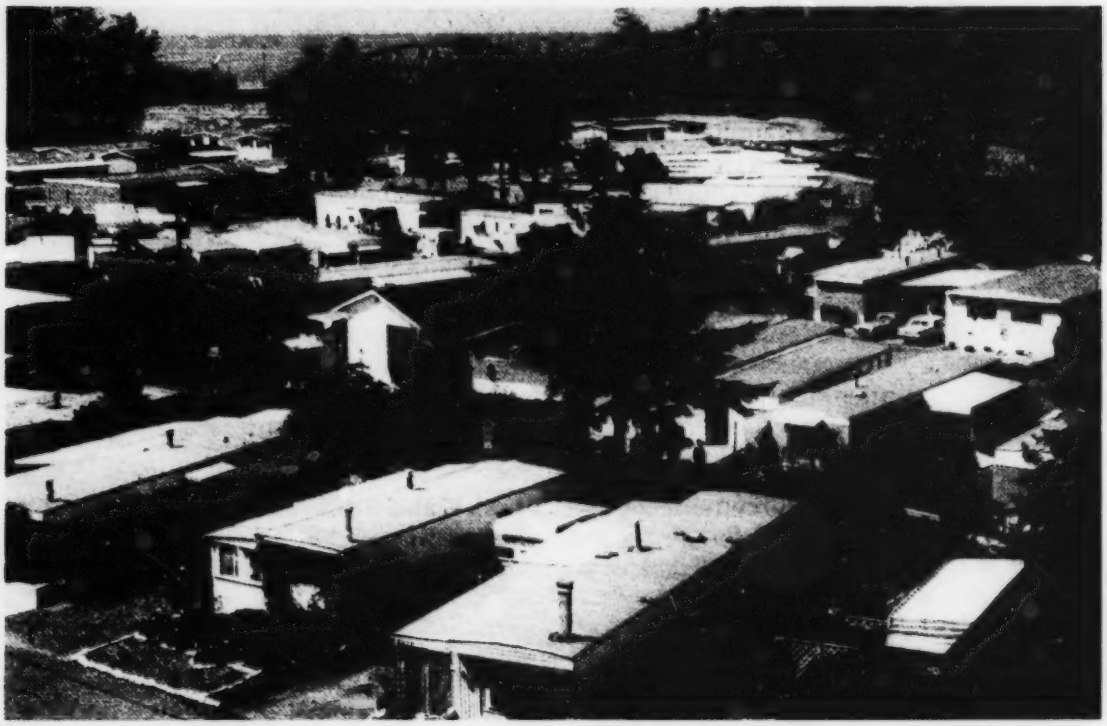
Since reserves are federal lands, police services would normally be provided by the Royal Canadian Mounted Police. In practice, however, these services may be provided by a provincial police force under an agreement between the federal and provincial governments. In any case, the RCMP is reluctant to enforce band by-laws because some are of a civil nature and the force's mandate is to deal with criminal matters. Provincial police forces have demonstrated a similar reluctance to enforce band by-laws.

In response to this dilemma, some bands have assigned their own police officers or by-law officers. However, opinions differ on a band's authority to create its own police force, as bands do not have a general power over the administration of justice under the *Indian Act*. The powers of enforcement officers appointed by the band are therefore limited to the duties set out in the by-laws of the band.

If an individual *is* charged with violating a band by-law, questions remain as to which court will deal with the matter. Crown prosecutors will only intervene in the case of criminal and statutory offenses. As is the case with municipalities, bands must often initiate proceedings where their by-laws have been violated. Although the *Indian Act* allows the Minister to appoint justices of the peace to deal with these cases, only

four are in place across Canada and there are legal concerns over the use of such appointments.

The end result of all these factors is that many bands have relatively few means to enforce their by-laws. DIAND has initiated several measures to consider these problems. These include an Indian Policing Task Force, established to develop a comprehensive policy on the delivery of policing services to Indian communities. A similar review has been initiated in regards to appointing justices of the peace.



DIAND's *Indian Band Council Procedure Regulations* represent another problem area. These regulations are confusing and there are no rules governing conflict of interest situations. Even the role of the band chief is unclear in relation to quorums and the chairing of meetings.

Further, it has been suggested that the *Indian Act* and related regulations lack consistency regarding the powers of the band council as opposed to the powers of the band itself. For example, while some important by-law items (such as membership codes and intoxicants) require the consent of the band, others (such as zoning) do not.

Finally, under the *Indian Act*, neither the band nor the band council have a defined legal status. This can lead to problems for bands wishing to sign contracts for basic community services or to take out loans. Many bands have experienced this lack of clear definition of their legal capacity as it obstructs their ability to exercise control over their affairs.

The problems and issues outlined above are magnified by DIAND's lack of resources to administer its by-laws responsibilities: the department simply does not have sufficient resources to handle the growing work load, much less to address the emerging problems and issues.

Phase II

Based on the findings of Phase I of the Lands, Revenues and Trusts Review, Phase II is focussing on a number of problems in key issue areas. These include:

- re-examining the mandate of the department and the Minister in regards to by-law formulation, approval and disallowance in light of concerns raised by Indian communities;

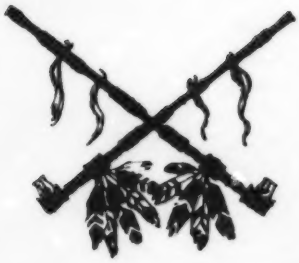
- developing options for amending the provisions of the *Indian Act* that deal with by-laws and the administration of justice to bring these more in line with current trends toward increased local control of band affairs;

- reviewing various ways to help band councils formulate by-laws, and enforce those by-laws once enacted;

- exploring opportunities for the creation of an Indian-controlled body that could play a role in the overall administration of by-laws; and

- determining DIAND's managerial and administrative capacity to respond to its mandate and any new mechanisms that may be required.

ELECTIONS



Background

The *Indian Act* recognizes two distinct processes by which members of an Indian band may appoint a chief and council. One is based on the band's "custom", or traditional approach to selecting local leaders. The second is defined in sections 74 through 79 of the *Indian Act*, which govern the election of chiefs and band councils.

Sections 74 through 79 set out the make-up of a council, the eligibility of voters and candidates, the election process, length of office, election appeals, the powers of the Governor in Council to make election orders or regulations, etc. These sections of the *Indian Act* are supported by the *Indian Band Election Regulations* (IBER), which govern how the election is conducted and establish the appeal process.

Officials of the Department of Indian Affairs and Northern Development frequently act as electoral officers for band council elections conducted under the *Indian Act*. This means the officials are directly involved in all aspects of the election, from the nomination meeting and establishment of the voters list through to running the polling station, counting the votes and casting a tie-breaking vote where necessary.

Today, more than 40 per cent of Indian bands conduct their elections according to custom. Until about three years ago, there was a growing trend among bands to move away from the *Indian Act* in favour of their traditional election practices. However, the legality of this practice has since come into question.

DIAND officials also investigate and make recommendations on election appeals. Under the current Act and regulations, a candidate in an election or the electors themselves can, within a prescribed time frame, lodge election appeals with the department. DIAND is responsible for reviewing the facts surrounding the appeal and, where necessary, appointing an individual to conduct an investigation and prepare a report. Based on the evidence presented in this report, the Minister can ask the Governor in Council to set aside the election results. This may occur if a corrupt practice has taken place with regard to the election, an ineligi-

ble candidate has run for office, or a violation of the Act or regulations has occurred that may have affected the outcome of the election.

As bands have become more active in managing their own affairs in recent years, and as individuals have become more aware of their rights, frustration with the *Indian Act* and the IBER has grown. One sign of this is the increasing number of election appeals launched by individuals. Anywhere from 10 to nearly 20 per cent of Indian elections and by-elections have been appealed in recent years.

Problems and Issues

For several years, Indian communities across Canada have been actively seeking changes to the election process. During that time, a number of basic problems have been identified.

One of the principal concerns is that the band election process, as defined in the *Indian Act* and the IBER, is restrictive and lacks the flexibility to respond to the needs of different bands. The Act does not permit Indian bands to develop their own election rules, and neither the Act nor the IBER allow bands to select aspects of the election process that might better meet their particular circumstances.

Other problems have also been identified with regard to the *Indian Act*. For example, voter eligibility is a key area of concern. The *Indian Act* requirement that an elector must be "ordinarily resident" on the reserve prevents off-reserve band members from voting. This problem is heightened by the fact that the definition of "ordinarily resident" in the IBER does not reflect the customs and traditions of many Indian communities. Bill C-31 further compounds this issue, as some bands want non-resident members to be eligible to vote in band elections.

Another area of contention is the length of office. Limiting band councils to a two-year term provides the council with little time to effectively put plans into action. Moreover, the Act establishes no eligibility criteria with regard to who may run for chief and contains no provisions for dual candidacy. There are also limitations on the band's ability to remove a councillor or chief from office.

Amendments to the *Indian Act* brought about by Bill C-31 have also raised some additional considerations for the election process. For example, once a band controls its own band membership list, it may be difficult for a departmental electoral officer to determine whether a voters list is valid under sections 74 through 79 of the *Indian Act*. Moreover, as the reserve population of some bands has increased as a result of Bill C-31, there has been a requirement to add new councillors. In some cases the controversy over Bill C-31 and a council's attempt to deal with it have resulted in considerable political upheaval.

Like the *Indian Act*, the *Indian Band Election Regulations* are out of date, incomplete and often cannot be followed in a practical way. As a result, there is a clear need to clarify responsibilities for administering elections and the appeal process.

Among the problems raised by Indian communities are the lack of criteria or rules for such important aspects of the election process as nominations, voters lists, polling procedures and recounts. The overall time frames for the election period often do not provide sufficient time for some bands to thoroughly revise the voters list or to permit an adequate transition period between the old and new chief and council. There are no provisions for advance polls or for voting by proxy. There is also a need for more specific recognition of the electoral officer's capacity to delegate to deputies and to make decisions in emergencies.

One of the most controversial sections of the IBER deals with election appeals. As described earlier, the appeal process is long (sometimes taking up to one year) and, once a decision is made, there is no recourse other than to the courts. As well, investigating officers are not provided with the appropriate powers and authority to properly investigate appeals.

While some Indian bands still rely on the department to run their elections, many bands feel DIAND is too extensively involved in the election process. At a minimum, many bands feel the department should be removed from the appeal process and that a different mechanism such as a tribunal, should be explored. Indeed, some bands and individuals have indicated that in the longer term, consideration should be given to the possibility of a total removal of the department from the band election process.

Many options for change have been put forth and explored in recent years. One thing is certain however: Indian input is essential to any substantive change to the legislation and regulations governing band elections. Moreover, flexibility is required in making changes as some bands may want to remain under the *Indian Act* for elections and others will want leeway to define their own election rules.

Phase II

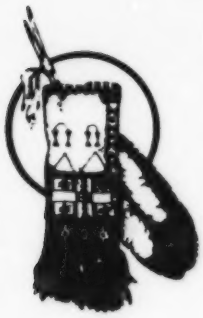
Based on the findings of Phase I of the Lands, Revenues and Trusts Review, Phase II will focus on a number of problems in key issue areas. These include:

- exploring, with Indian communities, possible changes to the band election process which could be achieved through modified *Indian Band Election Regulations*, with the purpose of removing procedural gaps and making the IBER a more practical tool for dealing with election issues;

- identifying options for amendments to sections 74 through 79 of the *Indian Act* to improve their relevance and to introduce the flexibility required to respond to evolving band needs, such as reversion to custom, longer terms of office, etc.; and

- examining the potential for an alternate process for handling election appeals, with a view to reducing administrative complexity and allowing for increased band involvement.

MEMBERSHIP



Background

Under the *Indian Act*, the federal government is responsible for maintaining the Indian Register — a list of all status Indians across Canada. The granting of "status" means that a person is formally recognized by the government as an Indian. Only the Indian Registrar, an official of the Department of Indian Affairs and Northern Development (DIAND), can grant status. This is done based on an assessment of a genealogical information.

Status is important to Indians for several reasons. It is a symbol of their cultural heritage and a recognition of certain rights. Status population figures are also a major factor in determining funding for a wide range of federal programs to Indian people.

The vast majority of status Indians are members of a band. Membership in a band provides Indian individuals and families with a sense of community, as well as certain basic legal rights. These include the right to live on a reserve, the right to share in the assets of the band and, in the case of band members ordinarily resident on a reserve, the right to vote in band elections. Band members living on a reserve are eligible for a variety of federal programs, including health, education, social assistance and housing assistance. As well, they may be exempt from paying income tax on earnings from on-reserve enterprises. Status Indians not resident on reserve have access to post-secondary education assistance and non-insured health benefits.

Until three years ago, DIAND was responsible for maintaining membership lists for each of the Indian bands across Canada. Historically, when the Indian Registrar granted an Indian status, that person was also automatically made a member of a specific band. Band lists were composed of status Indians only.

This situation changed dramatically with the passage of Bill C-31 in June 1985, which contained important amendments to the *Indian Act*. These amendments changed the sections of the Act that deal with the granting of status and with band membership. Bill C-31 had three principal goals:

- to eliminate discrimination based on gender and marital status in the *Indian Act*;

- to restore Indian status to victims of past discrimination; and

- to enable Indian bands to assume control over their own membership.

The *Indian Act* now essentially treats men and women equally when determining status, and prevents anyone from gaining or losing status through marriage.

Bill C-31 also provides for status to be restored to victims of sexual discrimination. This means that women who had lost their status because they married a non-Indian are now eligible to have their status restored. The children of those entitled to restoration of status are also eligible to become status Indians.

In another important amendment, Bill C-31 abolished the concept of "enfranchisement", by which a person agreed to give up his or her status and band membership.

Restoration of status or first time registration is not automatic: it must be applied for by those who feel they have a right to status under the Act as amended by Bill C-31. DIAND verifies these claims (by searching genealogical records, etc.) before granting status.

To date, more than 108,000 people have applied to have their status restored or to be registered for the first time as status Indians. As of November 1988, in excess of 50,000 individuals have been granted status and are now listed in the Indian Register.

Finally, as an important step toward Indian self-government, Bill C-31 grants bands the right to apply to the Minister of Indian Affairs and Northern Development for control of their own membership rules and list. Two conditions must be met before the Minister will approve such an application.

First, the Minister must be satisfied that a majority of band electors have consented to the band assuming control of membership, as well as to the specific membership rules proposed by the band.

Second, the membership rules proposed by the band must protect the rights of existing band members and of individuals who were eligible to be band members at the time the band assumes control of the rules and list.

Alternatively, bands may opt to leave control of their membership rules and list with the Minister. In such cases, the granting of status usually also confers membership in a band.

Regardless of who controls the membership rules and list, Bill C-31 ensures that Indians who lost their band membership due to the provisions of the previous Act will have it restored. Eligibility for reinstatement is not denied and acquired rights are protected.

To date, 287 bands have applied for control of their membership rules and list. Control has been granted to 223 of these bands. Fifty-three applications have been returned to bands because they did not meet both conditions as previously stated. As a result, only 11 membership rules applications are still under consideration by DIAND.

Problems and Issues

Bill C-31 has removed sexual discrimination from the *Indian Act*, restored lost rights for thousands of Indians and provided bands with greater control over their future. In effect, the *Indian Act* has been amended to respect the Charter of Rights and Freedoms. But Bill C-31 has also raised some difficult problems and issues in terms of Indian status and band membership.

One of the most common concerns expressed by bands centres around their ability to absorb new members. This is due in part to the limited infrastructure, including housing, and the fact that in some communities land is at a premium. Many bands also contend that they were not provided with adequate resources to properly assume control of their membership rules and lists and to provide appropriate levels of service.

In order to meet the anticipated requirements for additional funding, in 1985, the federal government approved $325 million (over five years) for implementation of Bill C-31. In response to the concerns that have been expressed, however, a task force was appointed to study the full range of issues and, in consultation with national Indian leadership and Indian community leaders, to develop recommendations.

Dual membership is another concern. A variety of problems have been identified in determining to which band a reinstated Indian individual should be assigned. In cases where DIAND controls band lists, an individual can be on only one list. However, there are no limitations on the number of band-controlled lists he or she can be on, which means that one Indian could have membership in several bands. The problem

arises in determining which band should include the individual as a member for purposes of calculating funding.

The transfer of membership rules and lists to bands has also impeded DIAND's ability to maintain accurate information on band membership. Not only does DIAND require up-to-date data on band membership to meet its statutory obligations, but other federal departments and provincial governments also require accurate demographic information, particularly if they are to adequately fund a range of programs offered to Indian people. However, there is no requirement for bands that control their own membership lists to update DIAND on changes to the lists. In the long term, this could seriously jeopardize the government's ability to fulfill its obligations to Indian people.

Finally, Bill C-31 has resulted in a dramatic increase in DIAND's workload — certainly to a much greater degree than had been anticipated. Prior to the passage of Bill C-31, it was impossible to accurately estimate the number of people who would be eligible for reinstatement. In addition to contending with 40,000 to 50,000 routine changes to the Indian Register each year (as a result of births, deaths and marriages), the department has been faced with a constant flow of applications for status and for approval of band membership codes. Organization, systems and procedural changes have been introduced over the course of the past year to cope with the volume of activity. These changes have resulted in elimination of initial backlogs, enabling the directorate to focus on the more difficult cases. As a result, new applications for status and approval of membership codes can now be addressed almost immediately.

Conscious of the importance of status and membership and the integrity of the Indian Register and band lists to the Indian people, further improvements are expected to be implemented as a result of the review.

Phase II

Based on the findings of Phase I of the Lands, Revenues and Trusts Review, Phase II will focus on a number of problems in key issue areas. These include:

- reviewing the administration of DIAND's status registration program with a view to improving its operational efficiency and effectiveness;

- identifying and implementing procedures to accelerate the processing of Bill C-31 applications;

- developing, in consultation with Indian communities, a more appropriate mechanism for the maintenance of band lists; and

- identifying possible additional amendments to the *Indian Act* or departmental policy based on an assessment of the impact of Bill C-31.